Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JEROME F. KRAMER,
INDIVIDUALLY AND AS
CLASS REPRESENTATIVE,

Petitioner,

V.

VISION CABLE OF PINELLAS, INC.,
A FLORIDA CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

A civil class action was brought in state court challenging the right of a cable television services provider to breach the terms of its franchise contract. Shortly after finding that the claims stated a cause of action, the trial court entered summary judgment disposing of the claims without providing any legal or factual basis for its ruling. A succession of summary rulings by the affirming appellate court likewise failed to mention any legal or factual basis. The Appellate court rulings were done in a procedural manner that, under Florida law, foreclosed any further review by the state's supreme court. Final summary disposition was devoid at all levels of any dispositive basis despite disclosure of conflict of the trial court's decision with a recent decision of the U. S. Supreme Court. As a result, the cable services provider has been summarily upheld in its right to take the property of over 300,000 plaintiff class members.

QUESTIONS PRESENTED

I. Is a state court system that permits causes of action to be summarily and finally determined without providing any legal or factual basis for decision from trial court through appellate court of last resort so unfair as to constitute a taking of property without due process of law under the circumstances of this case?

II. Were certain procedural mechanisms employed by the subordinate appellate court that foreclosed both appellate review and supervisory review of the state supreme court so unfair as to constitute a taking of property without due process of law under the circumstances.

III. When the Florida Constitution and Appellate Rules were amended in 1980 to eliminate discretionary review in the Supreme Court by Writ of Certiorari, and where no other discretionary review was provided to review the failure of a lower

court to meet the essential requirements of law as embodied in rules established by that Supreme Court, does the elimination of such discretionary review deprive the plaintiffs of equal protection of the law and thereby constitute a taking without due process of law?

PARTIES TO THE PROCEEDINGS

All parties to the proceeding below are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners herein respectfully pray that a Writ of Certiorari issue to review a final Order of The Supreme Court of Florida, entered on June 19, 1996 denying their Petition for a Writ of Prohibition.

OPINIONS BELOW

The Order of the Court on March 16, 1995 granting Defendant's Motion for Summary Judgment; the Final Summary Judgment on March 23, 1995; the decision by the Court of Appeals affirming the Summary Judgment, *"per curiam"* on March 27, 1996; the Order of the Court of Appeals on April 29, 1996 denying Appellant's Motion for Rehearing; the Order by the Court of Appeals on May 17, 1996 denying Appellant's Motion to Stay Issuance of Mandate; Issue of Mandate on May 23, 1996; Order of Supreme Court on May 28, 1996 denying Emergency Motion to Stay; and Order of the Supreme Court denying the Petition for a Writ of Prohibition on June 19, 1996. Copies of all of the foregoing are included in the Appendix to this Petition.

JURISDICTION

Jurisdiction for this Petition is invoked under Title 28 U.S.C. §1257 and Rule 10 of this Court. The Petition seeks review of the final order rendered by the highest court of the State of Florida on June 19, 1996. The petition claims certain rights, privileges and immunities under the Constitution and the Statutes of the United States.

CONSTITUTIONAL PROVISIONS

Article I, sec. 10[1] of the United States Constitution provides in pertinent part:
"No State shall *** pass any *** ex post facto Law, or Law im-

pairing the Obligation of Contracts, ***."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall *** be deprived of *** property, without due process of law; ***."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"No State shall *** deprive any person of *** property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 47 U.S.C. §543(a), (j) are set out in the Appendix.

STATEMENT OF THE CASE

In 1982 Pinellas County, Florida entered into a fifteen year franchise contract with a private cablevision provider named Vision Cable of Pinellas County primarily for the protection of resident subscribers in the southern portion of the county who thereby became third-party beneficiaries under that contract. The contract required prior approval by the county before changing rates, channels or tiers of cable services to subscribers.

Congress passed the Cable Television Control Act of 1992, 47 U.S.C. § 521-609, which permitted control and monitoring such changes by the F.C.C., except for franchise contracts pre-existing the effective date of the Act. After passage of the Act, the local cablevision provider notified its subscribers that certain rates would be changed and continued certain prior practices of shifting or changing channels or tiers of cable service, all without application to or approval by the county.

After first unsuccessfully seeking administrative relief from the county, a Complaint was filed against the cable provider on behalf of a main class of subscribers and included subclasses of same which was estimated at that time to exceed over 300,000 individual resident subscribers. The class action Complaint sought declaratory judgment and injunctive relief

and damages for the multiple breaches of contract alleged therein.

Florida is not a "notice pleading" state. Complaints are required to state ultimate facts sufficient to state a cause of action to be upheld. Defendant attacked the Complaint by various Motions To Dismiss and To Strike. The principal contention was that the Cable Act of 1992 had preempted and superseded all local franchise contracts. When Plaintiff pointed out that the subject franchise contract preexisted the effective date of the Act and was thereby exempt pursuant to 47 U.S.C. § 543 (j) from the control by the F.C.C., the Defendant's Motions directed against the sufficiency of the cause of action were overruled and, after directing certain modifications to the class allegations in the Complaint, the court ruled that the Complaint stated a cause of action and required the Defendant to Answer.

Defendant subsequently filed an Answer denying the factual allegations of each and every one of 32 paragraphs, except one, in the Complaint, and asserted 16 Affirmative Defenses, each of which were denied by Plaintiff's Reply. Just one week after filing its Answer and Defenses, Defendant filed a Motion for Summary Judgment and Noticed it for hearing on the actual eve of the judge's announced retirement.

In the meantime, Defendant took depositions from an in house county attorney and a deputy county administrator who had been newly assigned to oversee cablevision activities. In a Memorandum served and filed just four days before the hearing, Defendant argued that the county had an option to avoid the express exemption from F.C.C. control and that the Defendant therefore need not seek approval from the county under its original contract for any changes in rates, etc.

At the hearing, Defendant contended that there were no genuine issues of material fact and discussed its interpretation of the Cable Act of 1992 as noted above. Plaintiff informed

the court that there was no such option available under the Act, and that the county and Defendant were bound to their original contract by the Act's express exemption for such pre-existing contracts. Within two days of the hearing, the court entered an Order, finding that there "are no material issues of disputed fact and the Defendant is entitled to Summary Judgment as a matter of law." This finding, of course, was contrary to what the pleadings showed on their face. No contention was made during the hearing by Defendant that any of the multiple genuine issues of fact were either negated or otherwise removed from genuine dispute by any specific reference to any deposition, affidavit or exhibit. The erroneous findings by the court did not meet the plain essential requirements of Fla. Civ. Rule 1.510(c) governing summary judgment and there was absolutely no finding in the order or the record as to the law that was applied.

Plaintiff appealed seeking reversal of the summary judgment. Oral argument was held before a selected panel of three appellate judges, whose identities are not revealed until the morning of argument. Once identified, investigation of the panel judges revealed that each of them was a subscriber for cablevision services from providers owned and controlled by the successor-in-interest (Time-Warner) to the Defendant's interest in the franchise contract which is the subject of this action.

Within a few days the Appellate Court rendered a decision affirming the summary judgment *"per curiam"*. This decision, as well, made no reference to any legal or factual basis for the affirmance. Appellant immediately filed a Motion for Rehearing by a new and independent panel based in large part on the potential conflict inherent in the previous panel due to their relationship as subscribers to Defendant's successor-in-interest. That Motion was denied without reason.

There being no provision for direct or discretionary review to the Florida Supreme Court, Appellant filed a Petition for

Writ of Prohibition to prevent issuance of a Mandate by the challenged court panel. A Motion to Stay Issuance of the Mandate was concurrently filed in the Court of Appeals. Shortly, that court denied the Motion to Stay. An Emergency Motion to Stay was immediately filed in the Supreme Court. However, before that court acted on the Emergency Motion and pending Petition, the Clerk of the Court of Appeals issued its Mandate, thereby rendering the pending Motion moot. The Supreme Court then denied the Emergency Motion and the Petition without opinion.

Plaintiff's interpretation of the Cable Television Act of 1992 was first raised in the lower court in Memoranda and during oral hearings opposing Defendant's multiple Motions to Dismiss and to Strike the Complaint. This raised a federal question, which, when wrongly interpreted by that court, led to the erroneous grant of the Summary Judgment. Thereafter, this federal question infected all proceedings through the state's Court of Appeals and Supreme Court.

The questions regarding further violations of constitutional requirements became apparent only following the erroneous grant of the Summary Judgment when the court made findings that did not, in substance, fairly meet the essential requirements of the law as embodied in the summary judgment rule, Civ.R. 1.510, established by the state Supreme Court. There being no provision for assignment of error, the contentions that would support such violations of the Constitution were inherently advanced in the arguments in the Briefs filed by Appellant in the Court of Appeals. The Appellate affirmance "per curiam" gave no indication of whether these contentions and arguments were ever considered by the Court of Appeals, much less that court's reasoning for ignoring them.

These contentions were inherently raised again before that Court in Appellant's Motion for Rehearing, more especially at pages 9 and 13. Finally the federal questions and constitutional issues were more explicitly set forth throughout

Appellant's Petition for Writ of Prohibition. (both in Appendix)

REASONS FOR GRANTING THE WRIT

I. GENESIS OF THE PROBLEM BEGAN WITH ERRONEOUS GRANT OF SUMMARY JUDGMENT THAT FAILED TO MEET THE ESSENTIAL REQUIREMENTS OF THE LAW.

The genesis of the Constitutional issues and federal questions on which this Petition is based can be traced back from the tacit approval by the Supreme Court of the Court of Appeal's "Affirmance, per curiam" of the Order granting summary judgment by the lower court. That Order was based on the court's finding that "there are no material issues of disputed fact, and the Defendant is entitled to summary judgment as a matter of law."

As noted above, the pleadings on their face showed that there were multiple disputed issues of material fact. Defendant made no specific reference to any affidavit, deposition or argument to establish that there were no genuine issues of material fact and there was no support for any such contention. Accordingly, there was no basis in the record whatsoever for the court's erroneous finding that "there are no material issues of disputed fact".

Florida law, as embodied in Fla. Civ.R. 1.510(c) established by the Florida Supreme Court, required that two conditions be satisfied before summary judgment can be granted; (1) "that there is no genuine issue as to any material fact", and (2), in that event, "that the moving party is entitled to a judgment as matter of law."

The moving party has the burden to demonstrate the nonexistence of any genuine issue of material fact, Almand Const. Co. v. Evans, 547 So.2d 626(Fla. 1989). Thus, if there is only a single genuine issue of material fact, a summary judgment must

be denied, Warring v. Winn Dixie Stores, Inc., 105 So.2d 915 (Fla. 3rd DCA 1958). "Factual issues are not to be tried or resolved by summary judgment procedure." Parker v. Bryce, 96 So.2d 154, 155 (Fla. 1957). Thus, the court's finding was without support in the Record and clearly erroneous. In that event, the court failed to meet the first condition of Rule 1.510(c).

In the circumstances, where the first condition of the Rule has not been met, the court should not even have considered whether the second condition could be met. The trial court, however, without stating any rule of law relied upon, included the further finding — "and the Defendant is entitled to summary judgment as a matter of law". The only reasonable conclusion is that the court accepted the Defendant's contention that the Act preempted and superseded the preexisting franchise contract, citing Cox Cable v. U.S., 992 F.2d 1178 (11th Cir. 1993). The court ignored and failed to address the express exemption contained in §543(j) of the Act.

This was a curious turn of events because the court had already denied several Motions to Dismiss by Defendant on the basis that there was no preemption and that Plaintiff's Complaint stated legally supportable claims for breach of contract. Since the court could not meet the essential requirements of the law embodied in Rule 1.510(c), did it instead intend to treat the Motion for Summary Judgment as a renewed Motion to Dismiss?

At the Appellate Court, before oral argument, Appellant cited two new controlling decisions; Landgraf v. USI Film Prod. ___ U.S. ___ 114 S.Ct. 1483, 128 L. Ed 2d 220 (1994) and James Cable Partners v. Jamestown, Tenn., 43F.3d 277 (6th Cir. 1995), that once and for all should have defeated Defendant's preemption argument. Assuming arguendo that the lower court actually treated the Motion for Summary Judgment as a renewed Motion to Dismiss and that the Cox Cable decision applied, these intervening cases clearly demonstrate that the Defendant and the lower court were both wrong on the law to

be applied. Even so, inexplicably the Court of Appeal approved the erroneous grant of Summary judgment in a three word decision, "Affirmed per curiam".

The lower court's Order granting the Summary Judgment failed to meet the essential requirements of the law as embodied in Rule 1.510, and particularly part (c). A judgment void for lack of jurisdiction, or a proceeding characterized by a complete failure to observe essential requirements of the law is subject to correction at the discretion of the court vested with the power to issue the writ. Failure to observe the essential requirements of the law means failure to accord due process within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void, State v. Smith, (1960, Fla. App D1) 118 So2d 792; Gay v. Gainsville, (1966, Fla App D1) 186 So 2d 41. Moreover, a per curiam affirmance without any opinion has been held subject to review by certiorari where a conflict is established by the record proper. See Fla. Jur 2d. COURTS AND JUDGES (1st ed, COURTS). In this case, the conflict of the Appellate court's per curiam affirmance with this Court's 1994 Landgraf decision is obvious from the record which shows that the court below manifestly erred in its findings on the facts and the law to be applied.

The failure by the lower court to meet the essential requirements of the law embodied in Rule 1.510(c), as compounded by the "per curiam" affirmance of the Court of Appeals, clearly resulted in a taking of Plaintiff's property rights in the franchise contract without due process of law under the Fifth Amendment as applied to the states by the Fourteenth Amendment of the U. S. Constitution. The ultimate denial by the state Supreme Court of the Petition for Writ of Prohibition against the issuance of a Mandate confirming that per curiam affirmance further compounded these constitutional violations.

Plaintiff was entitled as a matter of right to due process of law, not merely the process of law. A primary reason for grant-

ing this writ is to clarify that due process of law requires some evidence that legal judgment has considered and determined bona fide legal issues, something closer to substance than mere form. Form, in this context, is the mere process of ending a dispute in a court system. Due process of law requires substance; in this context meaning at some level fairly addressing issues properly raised for adjudication. Florida's rules of procedure permitted final determination through appeal of last resort to avoid addressing a single legal issue.

II. AFFIRMANCE, PER CURIAM OF MANIFESTLY ERRONEOUS GRANT OF SUMMARY JUDGMENT WHICH FAILED TO MEET THE ESSENTIAL REQUIREMENTS OF LAW.

The lower court's Order granting Summary Judgment essentially consisted of a mere five lines on an otherwise bare captioned page. There was no opinion, no findings of fact and no statement of the law relied upon, nor the reasons therefor.

The Court's Order and Final Summary Judgment based thereon were appealed directly to the Second District Court of Appeal for the state of Florida. Before oral argument Appellant filed a "Notice of Supplemental Authority" (copy in Appendix) limited to informing that Court of Appeal about the controlling decision by the U. S. Supreme Court as interpreted by the Federal Sixth Circuit Court of Appeals, (citations above) which nullified Defendant's contention of "preemption" as adopted by the lower Court.

For example, at one point before the lower court and later in its Answer Brief on appeal, the Defendant had contended that the Pinellas County Commission had attempted to elect not to accept the express exemption provided by Sec. 543 (j) of the Act by passing an Ordinance 93-103 purportedly setting forth such an election. However, Appellant's Reply Brief pointed out that, if that was its intent, Ordinance 93-103 was void Ab Initio for impairing the obligations under the fran-

chise contract in violation of the express provisions of Art. I, Sec. 10(1) of the U.S. Constitution and of Art. I, Sec. 10 of the Florida Constitution and the attendant violations of due process of law that follow.

The oral argument was presented before a panel of three Appellate Judges who, by custom, remain anonymous until identified the morning of the oral argument. After oral argument, the backgrounds of the three Appellate Judges were investigated by Appellant, who determined that they should have been disqualified under Florida law for potential conflict as subscribers for cablevision services from providers controlled by the successor in interest to the Defendant's position under the subject franchise contract. The decision of the Court of Appeals was rendered within two weeks of the oral argument. It simply held "Affirmed, per curiam" without opinion. Such a pro forma summary disposition of the appeal was manifestly unfair in the light of the numerous complexities involving contract interpretation, state and constitutional issues, newly enacted federal legislation and the requirements for class action.

Appellant promptly filed a Motion for Rehearing raising, among other grounds, that the original panel should be disqualified and that the Appeal be re-heard before an entirely new panel who were not subject to the same or similar grounds for disqualification as was the first panel. Included in the other grounds were challenges to erroneous remarks of one judge at the oral argument concerning declaratory judgment. (a record is not permitted to be made of the oral argument.) This Motion also, in part, sought certification of the questions at issue to the state Supreme Court for review. The Motion was summarily denied without opinion and without cause or reason.

Under the Florida Constitution and Appellate Rules as amended in 1980, Appellant had no access to the state Supreme Court for direct review of the "per curiam" decision, nor for review of the denial of its Motion for Rehearing.

Because disqualification of the challenged panel would negate their power to hand down a valid enforceable decision, Appellant filed a Petition for Writ or Prohibition in the state Supreme Court to prevent issuance of a Mandate that would confirm the challenged panel's decision. It was Appellant's understanding that the state Supreme Court not only had the power to issue such a Writ, but that it also had the further power under their so-called "all-Writs" jurisdiction to review the holdings below. In Florida, prohibition is a process by which a higher court having appellate or advisory jurisdiction over a lower court can prevent the lower court from acting outside its jurisdiction or exceeding its judicial powers over a matter. The Florida Bar, 329 So.2d 301 (Fla. 1974). The Writ has been used successfully to prevent the enforcement of Orders already entered. Dix v. Richardson, 427 So.2d 1067 (Fla. 1st DCA 1983); Columbo v. Lependre, 397 So.2d 1043 (Fla. 5th DCA 1981). Further, the Writ is the proper avenue for relief after denial of a motion to disqualify a judge because of bias or other reasons. Bundy v. Rudd, 366 So. 2d 440 (Fla. 2978)); Time Warner Entertainment Co. v. Baker, 647 So.2d 1072 (Fla. 5th DCA 1994).

The Appellate Court's affirmance of the lower court's grant of Summary Judgment "per curiam" in the circumstances described above was so unfair as to constitute a taking of Plaintiffs' property rights without due process under the Fifth and Fourteenth Amendments of the U. S. Constitution. Such unfairness was extended and compounded by the challenged panel when they summarily denied Appellant's Motion for Rehearing without opinion or reason therefor. The lack of direct or discretionary access to the Supreme Court for exercise of their supervisory authority to correct wrong actions by their subsidiary courts amounts to a denial of due process of law. The subsidiary courts are learning that "per curiam" decisions and Orders of denial without opinion or reason leave no specifics to bring to the Supreme Court. It is an increasingly growing problem in Florida and does in fact deprive litigants of

their constitutional right for access to an appropriate court for review.

III. PETITION TO SUPREME COURT TO PREVENT ISSUANCE OF MANDATE THAT WOULD OTHERWISE CONFIRM "PER CURIAM" AFFIRMANCE OF ERRONEOUS SUMMARY JUDGMENT AND REFUSAL TO DISQUALIFY JUDGES WHO HAVE A POTENTIAL INTEREST IN THE OUTCOME.

The Florida Constitution, Art. I, Sec. 21 provides "the courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay." It also provides in Art. I, Sec. 2 that "all natural persons are equal before the law and have inalienable rights" which include the right "to acquire, possess and protect property****". Still further, it provides in Art. I, Sec. 9 that "No person shall be deprived of life, liberty or property without due process of law ***". These rights are in addition to the rights provided by the Fifth and Fourteenth Amendments to the U. S. Constitution which form the foundation for the within Petition.

However, in 1980 amendments to Art. V, Sec. 3 of the Florida Constitution and Appellate Rule 9.030(a) sharply limited the discretionary jurisdiction of the Supreme Court and eliminated its authority to review cases by certiorari. Attempts to access the court for discretionary review of questions formerly reached by certiorari have failed because there was no jurisdictional basis for such discretionary review. Vetrick v. Hollander, 464 So.2d 552,553 (Fla. 1985). In view of the foregoing, Plaintiff had no access to the state Supreme Court via certiorari to allow exercise of its supervisory authority over the lower courts in the state; e.g., to review actions that abused or failed "to meet the essential requirements of the law".

Under these circumstances in the instant case, after determining that the appellate panel which had affirmed the grant of summary judgment "per curiam" should have been disquali-

fied, Appellant moved for a "Rehearing" before a new qualified panel. This was summarily denied without stating cause or reason. The affirmance "per curiam" by a challenged panel where the challenge was summarily rejected by that panel is fundamentally unfair procedure which violated the due process requirements of the Fifth and Fourteenth Amendments to the U. S. Constitution.

Florida Statutes, §38.02 provides for disqualification and recusal of judges. F.S. §38.02 provides that "in any cause in any of the courts in this state" any party to or otherwise "interested in the subject matter of such litigation" may "show by a suggestion filed in the cause that the judge before whom the cause is pending *** is interested in the result thereof". Further, "If the truth of any suggestion appear from the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his disqualification, and declaring himself to be disqualified in said cause". The "suggestion" and the "grounds" therefore, as well as the basis for the truth of same, were fully set forth in Appellant's Motion for Rehearing.

None of the challenged judges of the panel filed any order of disqualification as required.

The unfairness of the activities in the Court of Appeals described above constitute a denial of the due process of law and of equal protection of the law under the Fifth and Fourteenth Amendments to the U. S. Constitution.

IV. THE UNFAIRNESS INHERENT IN THE FAILURE OF THE LOWER AND APPELLATE COURTS TO MEET THE ESSENTIAL REQUIREMENTS OF THE LAW WAS FURTHER COMPOUNDED TO AN EXTREME BY THE SUPREME COURT'S ACQUIESCENCE IN APPELLATE COURT'S ACTIONS WHICH MADE THE PETITION MOOT.

In view of the fundamentally unfair "per curiam" affirmance by the Appellate Court and denial of Appellant's chal-

lenge to the qualifications of the panel, Appellant promptly sought a Writ from the state Supreme Court to prevent issuance of a Mandate that would confirm the challenged panel and its decisions. Concurrently with filing the Petition for Writ of Prohibition, on May 14, 1996 Appellant filed a Motion to Stay issuance of the Mandate in the Court of Appeal pending disposition of the Petition. That Motion was summarily denied on May 17, 1996. On May 22, 1996 Appellant filed an "Emergency" Motion in the Supreme Court to Stay issuance of the Mandate. Before the Supreme Court could act on the Emergency Motion, the Clerk of the Court of Appeal issued the Mandate on May 23, 1996. Five days later, on May 28, 1996, the Supreme Court summarily denied Appellant's Emergency Motion to Stay. Twenty-two days later on June 19, 1996, the Supreme Court denied Appellant's Petition.

Since the state Supreme Court was on notice that the clerk of Court of Appeals had issued the Mandate before the Supreme Court could act on the Emergency Motion, it also was aware that the Petition was thereby rendered moot. Although denial of the Petition was summary without cause or reason, it is not unreasonable to infer that it as based upon the fact that issuance of the Mandate had rendered the Petition moot.

The improvident issuance of the Mandate within six days of the summary denial of Appellant's Motion to Stay, and one day after the filing of the "Emergency" Motion to Stay in the Supreme Court, which consequently rendered the pending Petition moot was so fundamentally unfair that it is a denial of due process of law under the Fifth and Fourteenth Amendments to the U. S. Constitution. The failure of the Supreme Court to promptly act on Appellant's pending "Emergency" Motion, or, in the circumstances, to belatedly grant the Emergency Motion with an Order quashing issuance of the Mandate, further compounded the unfairness to such an extreme extent as to manifestly deny due process of law to Petitioner. A State Supreme Court's judgment finally disposing of a Writ of Prohibition is a final judgment reviewable in United States Supreme Court on Certiorari. Madruga v. Superior Court, Cal.,

(1954), 346 U.S. 556, 74 S.Ct. 298, 98 L. Ed. 290.

CONCLUSION

After a 5-line Order from the lower court, a three-word decision from the Court of Appeal, a one-word denial of Rehearing, a one-word denial of a Motion to Stay by the Court of Appeal, a one-word denial of an Emergency Motion to Stay by the Supreme Court, and a one-word denial of the Petition; all of which consumed in excess of one year, the Plaintiff class of subscribers has no more knowledge or information about the legal status of their rights or claims under the original franchise contract than they had before filing the Complaint more than two years ago.

The unfairness of the treatment afforded to this class of subscribers by the lower court, the Court of Appeal and the state Supreme Court, as evidenced by the foregoing history, is so fundamental that it manifestly results in a taking of property from the class without due process of law under the Fifth and Fourteenth Amendments to the U. S. Constitution. The gravamen of that problem is the large hole in the appellate court system of this state which excludes a critical area of review from supervision by the state Supreme Court. This further results in a denial of equal protection of the law under the Fourteenth Amendment and of full access to the courts under the State Constitution. It also invites abuses by the appellate courts "of-last-resort" who have learned that under this system there is no review of "per curiam" decisions.

Grant of this Petition for certiorari, coupled with an Order to Quash the challenged decisions with a remand to continue to trial below, will cure the manifest unfairness and the wrongful taking of Plaintiffs' property without due process of law. It will also guide State court systems that a failure to provide meaningful supervisory review of abuses by lower courts is a denial of fundamental rights.A. Haddad, stating "I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER". The one exception; namely, the "Opin-

ion filed Mar. 27, 1996", carried the typewritten names of the three Judges of the panel without signatures; there being no certificate by the Clerk. (see Appendix) Significantly, no decision was ever announced at oral argument before the panel of judges.

SUPPLEMENT-September 10, 1996

On this date Petitioner and assistants obtained access to the original court files at the Florida Second District Court of Appeal headquarters in Lakeland, Florida. They found not a single Order or Opinion written or signed by any judge of that court. Nor did they find any signed, written instruction to the Clerk for any ruling by the Court. Instead, all but one of such documents had a typed certificate by the Clerk, William A. Haddad, stating "I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER". The one exception; namely, the "Opinion filed Mar. 27, 1996", carried the typewritten names of the three Judges of the panel without signatures; there being no certificate by the Clerk. (see Appendix) Significantly, no decision was ever announced at oral argument before the panel of judges.

On inquiry, the Clerk represented that it was not the Court's practice to render signed original "Opinions, Decisions or Orders". Instead, he, as Clerk, prepared such "Opinions, Decisions or Orders" based upon what he described as other "indicators" where available from the Judge or Judges involved; e.g., sometimes initials on the Motion or other document that may have given rise to such Orders.

Absent original "Opinions, Decisions or Orders" signed by the Judge or Judges involved, the Record shows only that such documents were apparently initiated and prepared by

the Clerk who then falsely certified on their face that they were true copies of "Original Court Orders". There is no way to hold any Judge of the panel accountable for the substance and content of any such clerical originated document. Nor is there any way to know whether any Judge had indeed received, examined and considered any part of the Record, Briefs or related documents of the case on appeal.

Indeed, such a clerical originated document is not the judicial act of a Judge, it is a mere ministerial act of the Clerk? Petitioner submits that such an "Opinion, Decision or Order" is not merely voidable, but that it is void ab initio and unenforceable. At the very least, it is a patent lack of due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution. For these reasons alone, this Court should accept the within Petition and exercise its supervisory authority in a manner suggested elsewhere herein.

Respectfully submitted,

JEFFREY N. KRAMER*
24 WEST THIRD STREET
SUITE 312
MANSFIELD, OHIO 44902
(419)522-7474
COUNSEL FOR PETITIONER

*Counsel of Record

APPENDIX

APPENDIX
IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA

JEROME K. KRAMER,
individually and as
Class Representative,
Plaintiff,

vs. Case No. 94-2593-CI-016

VISION CABLE OF
PINELLAS, INC.,
a Florida corporation,
Defendant.

/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, VISION CABLE OF PINELLAS, INC., (Vision Cable) by and through its undersigned attorneys, pursuant to Rule 1.510, Florida Rules of Civil Procedure, moves this court for the entry of a final summary judgment in its favor. The grounds upon which this motion is based and the substantial matters of law to be argued are as follows:

1. The pleadings, together with affidavits and depositions to be filed, show that there is no genuine issue as to any material fact and that the defendant is entitled to a final summary judgment as a matter of law.

2. Vision Cable has complied with all appropriate federal and state statutes and the terms of the franchise agreement, Ordinance 82-27. Any changes in rates, channel structure or services has been done in accordance with these authorities and will full knowledge and approval of the Board of County Commissioners.

3. In the event that 47 U.S.C. § 543(j) of the Cable Act of

1992 is applicable, under this Section the Board of County Commissioners has the discretion whether to continue to enforce the rate regulations in the franchise agreement. The County has specifically elected to follow the mandate of the Cable Act of 1992 and FCC regulations pursuant to its discretion under 47 U.S.C. § 543 (j).

4. The Cable Act of 1984 abrogated the local franchising Authority's ability to regulate rates and channel changes of the type alleged in plaintiff's Second Amended Complaint.

5. The Cable Act of 1992 and appropriate FCC guidelines preempt this area of law and any conflicting provision of Ordinance 82-27 would not be binding on Vision Cable.

WHEREFORE, defendant moves this court for the entry of a summary judgment in its favor and for attorney fees and costs in accordance with Florida Statutes § 57.105, and for such other and further relief as the court deems just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to George I. Sanchez, Esq., 3446 East Lake Rd., Suite 214, Palm Harbor, Fla. 34685 this 3 day of February, 1995.

JOHNSON, BLAKELY, POPE, BOKOR,
RUPPEL & BURNS, P.A.

BY: John A. Schaefer(s)
JOHN A. SCHAEFER
P. O. BOX 1368
Clearwater, Fla. 34617
(813) 461-1818
Attorneys for Defendant
SPN #00779903

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA
Ct. Civ. No. 94-2593-CI-20

JEROME F. KRAMER, individually and
as Class Representative,
Plaintiff

vs.

VISION CABLE OF PINELLAS, INC.,
a Florida Corporation,
Defendant.

ORDER

The Motion for Summary Judgment of VISION CABLE OF PINELLAS, INC. having come on to be heard before the Court, and the Court, having considered the pleadings, affidavits, depositions and argument of counsel, finds there are no material issues of disputed fact, and the Defendant is entitled to summary judgment as a matter of law.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 16th day of March, 1995.

John S. Andrews (s)
JOHN S. ANDREWS
Circuit Judge

Copies furnished:

George I. Sanchez, Esq., 3446 East Lake Rd., Suite 214, Palm Harbor, Fl. 34685; and John A. Schaefer, Esq., P. O. Box 1368, Clearwater, FL 34616.

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA

JEROME K. KRAMER,
individually and
as Class Representative,
Plaintiff,
vs. Case No. 94-2593-CI-020

VISION CABLE OF
PINELLAS, INC.,
a Florida corporation,
Defendant.
/

FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

The court having heretofore on March 16, 1995, entered an order ruling that defendant, Vision Cable of Pinellas, Inc., is entitled to summary judgment as a matter of law, and being otherwise fully advised in the premises, it is hereby

ORDERED that final summary judgment be, and the same is, hereby entered in favor of defendant, Vision Cable of Pinellas, Inc., and against plaintiff, Jerome F. Kramer, individually and as class representative, and the plaintiff shall take nothing in this cause, and the defendant shall go hence without day. The court reserves jurisdiction to consider motions on the subject of attorneys fees and costs.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this ___ day of March, 1995.

Circuit Court Judge

Copies furnished to:

F. Wallace Pope, Jr., Esq.
George Sanchez, Esq.

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY,
FLORIDA CIVIL DIVISION
CASE NUMBER 94-2593-CI-20

JEROME K. KRAMER,
individually and
as Class Representative,
APPELLANT

vs.

CLASS
REPRESENTATION

VISION CABLE OF
PINELLAS, INC.,
a Florida corporation,
APPELLEE

NOTICE OF APPEAL

NOTICE IS GIVEN that Jerome F. Kramer, plaintiff-appellant, appeals to the Second District Court of Appeal, from the Final Summary Judgment of dismissal of the above styled cause rendered on March 21, 1995.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to John A. Schaefer, Esq., Johnson, Blakely, Pope et al, P. O. Box 1368 Clearwater, FL 34617-1368, attorney for Defendant, by U. S. Mail this 19th day of April, 1995.

GEORGE I. SANCHEZ, P. A.

George I. Sanchez (s)
George I. Sanchez, Esq.
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3446 East Lake Rd.,
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e

(813) 789-2222
SPN 376796 FBN 460257

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

JEROME K. KRAMER,
individually and
as Class Representative,

Plaintiff/Appellant

Appeal No. 95-1470
L.T. Case No. 94-2593-CI

vs.

CLASS
REPRESENTATION

VISION CABLE OF
PINELLAS, INC.,
a Florida corporation,

Defendant/Appellee

APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 9.210(g), Fla. R. App. P., appellant hereby brings to the attention of the court the following recent legal authorities which have not been previously referred to in any of the Briefs of the parties:

1. James Cable Partners v. Jamestown, Tenn., 43 Fd.3rd 277 (the Cir. 1995).
2. Landgraf v. USI Film Products, 511 U.S. _, 128 L. Ed. 229, 114 S. Ct. 1483 (1994).

Respectfully submitted,

George I. Sanchez (s)
George I. Sanchez
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to John A. Schaefer, Esq., P. O. Box 1368, Clearwater, FL 34617, attorney for Defendant, by U. S. mail this 7th day of March, 1996.

GEORGE I. SANCHEZ, P. A.

George I. Sanchez (s)
George I. Sanchez, Esq.
Attorney for Appellant
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Palm Harbor, FL 34685
(813) 789-2222
FBN 460257

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
SECOND DISTRICT

JEROME K. KRAMER,
individually and
as Class Representative,

Appellant Case No. 95-01470

vs.

VISION CABLE OF
PINELLAS, INC.,
a Florida corporation,

Appellee

Opinion filed March 27, 1996.

Appeal from the Circuit Court for Pinellas County; John S. Andrews, Judge.

George I. Sanchez, Palm Harbor, for Appellant.

F. Wallace Pope, John A. Schaefer, and Duane A. Daiker of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P. A., Clearwater, for Appellee

PER CURIAM

AFFIRMED.

Danahy, A.C.J., and Lazzara and Fulmer, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

JEROME F. KRAMER, individually and as Class Representative, Plaintiff/Appellant, vs.	)	Appeal No. 95-1470
	)	Case No. 94-2593-20
VISION CABLE OF PINELLAS, INC., a Florida corporation, Defendant/Appellee.	)	

MOTION FOR REHEARING OR,
IN THE ALTERNATIVE,
FOR CERTIFICATION

Plaintiff/Appellant moves for rehearing in this appeal because the judgment rendered genuinely appears to be the result of the court's having misapprehended a fact.

I. **Basis for rehearing**

Appellant moves for rehearing pursuant to App.R. 9.330 on the basis that the panel's decision was based on a misapprehension of a critical fact that was articulated by Judge Lazzara at oral argument as his decision point. Further, for reasons that will be set out fully below and that could not have been discovered prior to the earlier oral argument, rehearing should properly be held before a different panel because of material conflicts of interest.

Judge Lazzara apparently reviewed the briefs on this appeal. He was the judge questioning both parties' counsel. Judges Danahy and Fulmer apparently relied upon Judge Lazzara's representation of what he determined as the critical fact on this appeal. Regrettably, that one critical fact that served as the decision point in this case was **overlooked and misapprehended**.

The critical mistake was Judge Lazzara's representation that

he assumed that Pinellas County Ordinance 93-103 was in existence at the time Defendant/Appellee Vision Cable breached its contract. Judge Lazzara then stated that Ordinance 93-103, until and unless ruled unconstitutional, immunized Defendant/Appellee from any liability for its breach of contract with the Plaintiff class of cable television subscribers. This fact, which Judge Lazzara indicated was fatal to Appellant's claims, was **false**. The false issue of Ordinance 93-103 and its effect on these proceedings was raised by Judge Lazzara on his own initiative, as it had not been briefed by any party in the appeal.

The legislative history, attached as an appendix to this motion, demonstrates that **Pinellas County Ordinance 93-103 was not in effect at the time** of Defendant's breach. In fact, **Ordinance 93-103 had not even been presented** to the Board of County Commissioners in draft form **as a proposal until two months after Defendant's breach**.

In reliance on this fact, which can be demonstrated as clearly false, Judge Lazzara then misapprehended another. He assumed that Pinellas County Ordinance 93-103 had been intended to direct Vision Cable to change its rates charged to all subscribers in the County to conform with federal benchmark rates under the Cable Act of 1992. The record demonstrates that the Ordinance was never intended to direct such action and could not have accomplished that object as a matter of law.

These two mistakes, one of critical fact, one of misapprehension of the purpose for the post-breach passage of Pinellas County Ordinance 93-103, apparently caused Judge Lazzara and the panel to dispose of the appeal as if on a motion to dismiss for failure to state a cause of action. The panel would have then overlooked the merits of Appellant's appeal, which focused on the presence of numerous genuine issues of material fact that should have foreclosed summary judgment being granted.

Additional errors of law stemming from the misapprehension of fact are pointed out below where they concern issues raised by the court at oral argument that were not briefed by

the parties nor raised by the pleadings. Accordingly, they are appropriate for address in this motion.

II. **Analysis of errors**

a. Recapping Judge Lazzara's pertinent questioning at oral argument.

The trial court never articulated a reason or basis for entering its premature summary judgment on this class action just after the Defendant Answered the Amended Complaint. This court similarly entered a *per curiam* decision with no opinion.

Although no opinion accompanied the decision, Judge Lazzara articulated his decision point at the oral argument on March 12.

Judge Lazzara was the questioning judge who had apparently familiarized himself with the briefs at oral argument. Judge Lazzara took the lead in questioning both parties' counsel for the panel. He made it clear that he was assuming that Pinellas County Ordinance 93-103 had been enacted prior to the time that Defendant/Appellee, Vision Cable, changed its rates for basic cable services and rebundled and re-tiered the channels that served as the basis for Plaintiff class' three count breach of contract claims. His assumption that Ordinance 93-103 had been enacted by the time of the changes in rates and structure of the cable coverage was his decision point.

Judge Lazzara challenged the undersigned at oral argument about whether Defendant Vision Cable could be held liable for acting in accord with what he misapprehended as a presumptively valid, pre-existing Ordinance 93-103 until and unless that Ordinance had been found, through declaratory action, to be unconstitutional.

This is enough to illustrate the error based upon Judge Lazzara's misapprehension of a critical fact. Neither of the other two judges on the panel at oral argument challenged Judge Lazzara's erroneous assumption about the timing or purpose of passage of Pinellas County Ordinance 93-103. We assume the panel accepted his representations as accurate about Ordinance 93-103 having been in effect at the time of Vision Cable's breach of contract. Plaintiff's counsel was not

prepared at oral argument to enlighten Judge Lazzara and the panel about this critical mistake of fact. Appellant had not briefed this issue because it had not been advanced by Defendant.[1]

b. The first factual error.

Judge Lazzara's assumption that Ordinance 93-103 was in effect at the time of the allegedly unlawful actions of the Defendant was error. Pinellas County Ordinance 93-103 was not in effect at the time Defendant changed its rates and channel structure for the "Universal" tier of cable service.

Vision Cable gave notice to its subscribers that it had changed its rates in a letter dated and sent to subscribers, including Plaintiff class representative Jerome F. Kramer, on August 25, 1993. (copy attached as Exhibit F to the Second Amended Complaint). Pinellas County Ordinance 93-103[2] was not even proposed to the Pinellas County Board of County Commissioners until November 3, 1993, more than **two months after** the breach by Defendant.[3]

At the time Defendant Vision Cable changed its rates for its basic cable services, re-tiered and rebundled those services, it did so without any possible authority from Ordinance 93-103, because the Ordinance had not yet even been proposed. Its breach of contract was completely unjustified. Judge Lazzara's grasp of the timing of that Ordinance was wrong.

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[1]Therefore, as this court has accepted public records bearing on these authorities and Ordinances as Appendices to prior briefs, the official public records illustrating the legislative history of Pinellas County Ordinance 93-103 and its companion Resolution 93-293 are attached as appendices to this motion for the purpose of correcting the court's own misconception about this critical fact.

[2]PCO 93-103 is found as Exhibit S in the Appendix to Appellant's Initial Brief.

[3]see both October 5, 1993 memoranda from Pinellas County Administrator Fred E. Marquis to the Board of Pinellas County Commissioners in the Appendix to this motion.

Judge Lazzara's purported excuse for Vision Cable's actions therefore has no merit and the panel's decision based on that fact alone should be promptly reversed.

c. The second error of misapprehension of law.

Because Judge Lazzara assumed that Ordinance 93-103 pre-existed Defendant Vision Cable's breach, he made a second error about the impact of that ordinance on Defendant's breach. Judge Lazzara stated that the purpose of Ordinance 93-103 was to direct Vision Cable to change its rates to those set forth within applicable federal regulations under the Cable Act of 1992.

Defendant Vision Cable had only defended on the position that the federal Cable Act of 1992 had preempted local franchising authorities' rate setting authority or, in the alternative, that the Cable Act of 1992 had rendered the honoring of existing cable services franchise agreements an option at the election of each local franchising authority. Defendant Vision Cable had never raised or argued any defense that Pinellas County Ordinance 93-103 governed, authorized, or directed its actions in changing, re-tiering and rebundling cable services because it knew such was a specious argument based on the timing and more limited purpose for that Ordinance.

This misapprehension of the purpose of Ordinance 93-103, must also be corrected. For that purpose, the excerpts from certain Board of County Commissioners meetings, work conference minutes, and related public record documents bearing on its legislative history, clearly demonstrate Judge Lazzara's misinterpretation of the purpose for Ordinance 93-103. This legislative history is set forth as an Appendix to this motion for the court's assistance.

Pinellas County had four different cable television service companies operating under franchises in the County at that time. The conclusion to be drawn from those excerpts and the timing of Ordinance 93-103 is that it was drawn solely to insure that Pinellas County, as a local franchising authority already exempt from regulation by virtue of 47 U.S.C. §543(j), would be able to continue to regulate any of the four cable

companies in the future.

Ordinance 93-103 implicitly reaffirms those franchises, including Defendant Vision Cable's franchise Ordinance 82-27, which is the basis for the Plaintiff class' claims in this action. It does not direct that any of those prior franchises be amended. It does not amend any of the prior franchises. It simply parrots the instructions accompanying FCC form 328, which was the form being considered for filing with the FCC at that time. Those regulations give all qualifying local franchising authorities the power to regulate or to continue to regulate rates at the local level. The instructions with FCC form 328 therefore explain that any provision in any franchise agreement that purports to bar regulation by a local franchising authority would henceforth be void.[4] Ordinance 93-103 was enacted as part of filing FCC form 328, nothing more. Pinellas County's purpose in filing FCC form 328 was solely to preserve its existing power to locally regulate the rates of its several cable franchisees.[5]

Judge Lazzara misapprehended this limited purpose for Ordinance 93-103. This confusion may explain his confusion about whether it had been passed at the time of the breach. Indeed, under the mistaken view that the purpose of Ordinance 93-103 was meant to change existing cable rates, not merely to follow the FCC form 328 instruction to void provisions that barred rate regulation by the local authority, it would make no sense to pass an Ordinance after the rates had al-

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[4]see FCC form 328 instructions at paragraph 8, addressing question 4(a), attached as Exhibit T in Appendix to Appellant's Initial Brief.

[5]see Exhibit X to Appellant's Reply Brief, Ordinance 95-12, which is an assignment of that existing cable franchise with Vision Cable to Time-Warner in February 1995. That assignment references the franchise, Ordinances 82-26 and 82-27, but makes no mention of Ordinance 93-103. This **confirms** that PCO 93-103 was never intended to amend the rates being charged under the pre-existing Ordinance, 82-27.

ready been changed by the franchisee. Passing an Ordinance after the fact would have made no sense to Judge Lazzara or any other panel member, so we believe the panel just assumed in error that Ordinance 93-103 was passed before the breach by Defendant Vision Cable and that its purpose was to alter the rates set under the prior franchise Ordinance 82-27.

To assume that the Ordinance meant to change existing rates set by Franchise contracts that were expressly exempt from regulation by 47 U.S.C. §543(j) of the Cable Act of 1992, would be to give Ordinance 93-103 an unconstitutional effect. This Court is bound to assume a constitutional purpose for Ordinance 93-103.

That intended constitutional purpose is plain when Ordinance 93-103 is viewed within the timing and circumstances of its passage. Its purpose was to assure the County's continued qualification as a local franchising authority.

d. Ordinance 93-103 could not have the effect ascribed by Judge Lazzara as a matter of law.

Despite the absence of any repealer or amendment to modify rates set under Ordinance 82-27, Judge Lazzara's questioning showed misapprehension of law in his assumption that if Ordinance 93-103 had been passed before the breach, (which it was not,) and if it had been intended to change the rates and services previously set forth in the original franchise contract set forth in Ordinance 82-27, (which it did not,) that it would be effective to allow the franchisee, Defendant Vision Cable, to take the actions it did. This is not in accord with Florida law. As the issue was not briefed and surfaced only through Judge Lazzara's questioning at oral argument, Appellant suggests review of State, ex rel. Melton v. Bd. of Public Instruction for Dade County, 191 So. 27 (1939).

e. No jurisdiction existed for the suggested declaratory action.

Judge Lazzara's final suggestion was that a declaratory action against the County should have been initiated in Circuit Court as a condition precedent to the instant claim against

the cable franchisee, Vision Cable. This was another issue never raised by the pleadings or briefs of either party. Appellant responds that, as there was no doubt about the construction of the franchise, Ordinance 82-27, and there was no doubt that Plaintiff class members had vested legal rights under that franchise, no jurisdiction for the suggested declaratory action would have existed. see Abruzzo v. Haller, 603 So.2d 1338 (Fla. 1st DCA 1992); New Amsterdam Casualty Co. v. Intercity Supply Corp., 212 So.2d 110 (Fla. 4th DCA 1968); and Smith v. Milwaukee Ins. Co. of Milwaukee, 197 So.2d 548 (Fla. 4th DCA 1967). In any event, paragraph 1 of Plaintiff class' prayer for relief in its Second Amended Complaint requests declaratory relief, asking that Ordinance 82-27 be declared valid through its date of expiration.

f. This court could not assume a role as advocate to advance a defense not raised by the pleadings or in the trial court.

If Vision Cable had unlawfully changed its rates, but the court determines that the subsequent passage of Pinellas County Ordinance 93-103 somehow "cured" the wrong, this court could not decide the case on that ground because it would be contrary to the law of this state. It is axiomatic that issues to be adjudicated are confined to those framed by the pleadings. Defenses not raised are waived. Parties are entitled to rely on the pleadings as framing the issues on which the case will be determined. For this court to raise an affirmative defense in Defendant's favor is contrary to law.

g. The mistake in fact caused the court to overlook the issue of the existence of genuine issues of material fact raised in the Initial Brief.

In this case, Judge Lazzara's suggestion about first seeking declaratory relief was not only based upon misperception of fact about the relative timing of the ordinance, but was also compounded by bringing it up as a new defense that had not been raised in the pleadings. This constituted an abuse of judicial process and a denial of due process to Appellant. It did more, however, in that it led the panel to overlook the appro-

priateness of summary judgment in a case where there were a multiplicity of genuine issues of material fact.

This court, like the trial court before it, treated the appeal as if it were a motion to dismiss for failure to state a cause of action under Civ.R. 1.140(b)(6). In doing so it overlooked the obligatory summary judgment burden mandated by **Civ.R. 1.510(c)**, which requires that it be shown both that "**there is no genuine issue as to any material fact**" and "**that the moving party is entitled to a judgment as a matter of law.**" This court overlooked the first part of the burden by examining only an issue of law based on a fact that has now been demonstrated to be false. Further, Judge Lazzara raised a new genuine issue of material fact about the timing and effect, if any, of Ordinance 93-103. Having raised it, Plaintiff class should have been given its due process right to investigate and address that fact on a remand.

h. The erroneous factual determination on which decision was based caused this court to overlook an important constitutional issue of impairment of contract that is of great public importance to Plaintiff class members and potentially numerous other similarly situated persons throughout Florida.

This court overlooked the constitutional issue of impairment of contract based upon its determination that Ordinance 93-103 would first have to be challenged in a separate claim in Circuit Court before any of Plaintiff class' claims against Defendant Vision Cable could proceed. The constitutional issue does not revolve around Ordinance 93-103 which, appropriately considered, has no bearing on these claims at all. The constitutional issue raised by the parties was whether the federal Cable Act of 1992 preempted and superseded the local fifteen year franchise contract enacted in 1982 as Ordinance 82-27. Defendant Vision Cable relied upon the older Cox Cable case, while Plaintiff class brought newer, controlling authority of the United States Supreme Court's Landgraf decision and the United States Sixth Circuit's James Cable Partners decision to the court's attention in a notice of supplemental authority. This is an important issue that was overlooked.

III. **Basis for requesting rehearing before new panel.**

Under this court's internal procedures, no announcement of panel members on an appeal is made until the day of oral argument. The panel at oral argument of the instant case on March 12, 1996 was Judges Lazzara, Danahy and Fulmer.

The record demonstrates that four circuit judges recused themselves from considering this case at the trial level for the identical reason that each was a subscriber to cable services operated by the Defendant, Vision Cable. A copy of those orders of recusal is in the record. Each judge determined that as a cable subscriber, he had a possible or potential conflict of interest sufficient to warrant recusal to avoid any appearance of impropriety.

On information and belief, all three members of the panel were and are subscribers to Time-Warner cable television services through service providers controlled by Time-Warner, including Jones Cable and Paragon. Time-Warner took over Defendant, Vision Cable's franchises in Pinellas County in February, 1995.[6] Time-Warner has subsequently, prior to the hearing on March 12, 1996, taken over Paragon and Jones Cable service providers in Hillsborough and Polk Counties. Any subscriber to these cable services would have the same potential for conflict of interest as the four circuit court judges already recused. Appellant requests the panel recognize this potential for conflict and act to have the appeal reheard before a new panel that has been pre-screened to avert these issues.

Judge Lazzara may have a further conflict of interest. He has been nominated for the U.S. District Court, Middle District of Florida. Although his background check is complete, his confirmation hearing has not yet commenced. This is his second try for a judicial appointment to the federal court. His first nomination was by Republican senator, Connie Mack. The current nomination is by Democratic senator, Bob Graham.

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[6]see Exhibit X in Appendix to Appellant's Reply Brief.

On information and belief, the family of Senator Bob Graham owns or controls substantial interest in the Washington Post. The Washington Post, on information and belief, has a policy that has caused it to acquire widespread ownership interest in broadcast and publishing mass media outlets such as Time-Warner. Judge Lazzara knew or should have known of this financial interest in the Defendant's successor, Time-Warner. Judge Lazzara should avoid the appearance of impropriety by recusing himself from further involvement in this appeal.

IV. **Conclusion**

The lower court gave no basis for entering the summary judgment. This court issued its *per curiam affirmance* without giving any record of the basis for its decision for further review. Surely a party deserves more from our system. We are all trying to be good lawyers here.

In this case, if the *per curiam* decision is not reexamined where the lower court gave no basis for its decision, where the principal point raised at oral argument was based on a factual mistake on one judge's part in his analysis of the record, then the Plaintiff class will never know whether there was any lawful basis for their claims being dismissed. We ought to correct the mistake.

V. **Basis for certification**

Plaintiff also requests certification to the Florida Supreme Court. The facts presented in this appeal present a question of constitutional dimension, including impairment of contract under Article I, section 10 of The Florida Constitution. The case also presents a serious question of this court concluding that Ordinance 93-103 is valid as a basis for their affirmance. Further, there is an unresolved underlying federal constitutional issue of preemption.

Plaintiff is a class that is numerous, exceeding 300,000 subscribers or potential subscribers in Pinellas County alone. Resolution of the questions, aside from the importance of deter-

mining whether an Ordinance passed after the fact of a material breach of contract by a public cable services provider can forgive the breach and immunize the breaching party from liability, is one of great public importance affecting a substantial number of Florida citizens. It may affect other cable subscribers in other franchise areas throughout the state with similar issues. THIS ISSUE SHOULD BE CERTIFIED TO THE FLORIDA SUPREME COURT.

CERTIFICATION

As co-counsel for Appellant on this appeal, I certify that I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

Jeffrey N. Kramer (s)
JEFFREY N. KRAMER, ESQ.
Florida Bar No. 354287
The Walnut Building, Suite 312
24 West Third Street
Mansfield, Ohio 44902
tel. (419) 522-7474 / fax (419) 522-7478
CO-COUNSEL FOR APPELLANT

A true copy of the foregoing and its appendix has been served on below listed counsel,

Mr. John A. Schaefer, Esq.
Johnson, Blakely, Pope, Bokor,
Ruppel & Burns, P.A.
P.O. Box 1368
Clearwater, FL 34617

Mr. George Sanchez, Esq.
3446 Eastlake Rd.
Suite 214
Palm Harbor, FL 34685

by U.S. Mail this 9th day of April, 1996.

Jeffrey N. Kramer (s)
JEFFREY N. KRAMER, ESQ.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
APRIL 29, 1996

JEROME F. KRAMER, etc.,

Appellant (s), Case No. 95-01470

v.

VISION CABLE OF PINELLAS,
INC., a Florida corp.,

Appellee (s).

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for rehearing or in the alternative, for certification in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER
WILLIAM A. HADDAD (s)
WILLIAM A. HADDAD, CLERK

c: George I. Sanchez, Esq.
Jeffrey N. Kramer, Esq.
John A. Schaefer, Esq.

/PM

(SEAL)
District Court of Appeal
State of Florida
Second District

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

JEROME F. KRAMER, individually and as Class Representative, Plaintiff/Appellant, vs.	)	Appeal No. 95-1470
	)	Case No. 94-2593-20
VISION CABLE OF PINELLAS, INC., a Florida corporation, Defendant/Appellee.	)	

MOTION TO STAY ISSUANCE OF MANDATE UNTIL PETITION FOR WRIT OF PROHIBITION IS DETERMINED

PLAINTIFF/APPELLANT moves for entry of an order staying issuance of the mandate in the captioned appeal, stating as grounds therefore that a petition for writ of prohibition has been filed with the Florida Supreme Court against the issuance of the mandate by the Second District Court in this appeal and it is appropriate to allow that petition to be determined before acting further in the appeal. A copy of the petition for writ of prohibition is filed herewith.

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CO-COUNSEL FOR APPELLANT

A true copy of the foregoing has been served on

below listed counsel,

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Johnson, Blakely, Pope, Bokor,
Ruppel & Burns, P.A.
P.O. Box 1368
Clearwater, FL 34617

Mr. George Sanchez, Esq.
3446 Eastlake Rd.
Suite 214
Palm Harbor, FL 34685

by U.S. Mail this 13th day of May, 1996.

Jeffrey N. Kramer (s)
JEFFREY N. KRAMER, ESQ.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
APRIL 29, 1996

JEROME F. KRAMER, etc.,

Appellant (s), Case No. 95-01470

v.

VISION CABLE OF PINELLAS,
INC., a Florida corp.,

Appellee (s).

BY ORDER OF THE COURT:

Counsel for Appellant having filed a motion to stay issuance of mandate until petition for writ of prohibition is determined in the above-styled case, upon consideration, it is ordered that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER
WILLIAM A. HADDAD (s)
WILLIAM A. HADDAD, CLERK

c: George I. Sanchez, Esq.
Jeffrey N. Kramer, Esq.
John A. Schaefer, Esq.
F. Wallace Pope, Jr., Esq.
Duane A. Daiker, Esq.

/BL

(SEAL)
District Court of Appeal
State of Florida
Second District

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA,
SECOND DISTRICT

Case No.95-01470

JEROME F. KRAMER, individually Petitioner,	)	
vs.	)	NOTICE TO INVOKE DISCRETIONARY JURISDICTION
VISION CABLE OF PINELLAS, INC., a Florida corporation, and CHIEF JUDGE, SECOND DISTRICT COURT OF APPEAL, Respondents	)	

PETITION FOR WRIT OF PROHIBITION

Pursuant to Fla.R.App.P. 9.100, Petitioner JEROME F. KRAMER, as Class Representative, respectfully petitions the court for a writ of prohibition restraining the Florida Second District Court of Appeal from issuing its mandate or such further relief in aid of such restraint as may be necessary under its all writs jurisdiction and shows the court as follows:

I.
BASIS FOR INVOKING JURISDICTION

This court has jurisdiction to issue a writ of prohibition under Art. V § 4(b)(3) Fla.Const. (1980) and Fla.R.App.P. 9.030(b)(3). Prohibition is the proper remedy where there has been an unauthorized use of judicial power by a lower tribunal. The respondent court denied a motion for rehear-

ing while all three of its panel members were subject to a pending disqualification motion. This was error. Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); Time Warner Entertainment Co. v. Baker, 647 So.2d 1072 (Fla. 5th DCA 1994). The unauthorized use of judicial power was a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal.

II.
FACTS UPON WHICH THE PETITIONER RELIES

This civil action claimed damages on behalf of a plaintiff class of cable television subscribers as a result of the defendant cable television company's multiple breaches of its fifteen year cable franchise contract with Pinellas County. (Second Amended Complaint-**App. tab A**) The defendant cable company's purported justification for the breaches, which included imposing additional substantial cable charges on the plaintiff class through both direct increases in basic cable fees and indirect rebundling and retiering of desirable channels to higher-priced channel packages, was that the federal Cable Communications Act of 1992 preempted the local franchise agreement and forced them to do it. (Answer-**App. tab B**)

Four Pinellas County Circuit Court Judges recused themselves from hearing this case because, as cable subscribers to the defendant's services, each had a potential conflict of interest. Three of these did so on their own initiative, one upon motion for recusal by the plaintiff. (recusal orders-**App. tab C**) Following entry of summary judgment, the defendant was acquired by Time-Warner. During the pendancy of this appeal before the Second District Court of Appeals, Time-Warner also acquired two cable companies in Hillsborough County to which all three of the appellate judges on the panel hearing this appeal were subscribers. Unfortunately, public announcement of this acquisition, which had taken place in February, 1996, was not published through press release until after the hearing on the appeal.

The conflicts that news presented were the same as those that caused the four circuit court judges to recuse themselves and more: One of the panel members, Judge Lazzara, had a federal district court nomination for a seat on the Middle District court pending through U.S. Senator Bob Graham, members of whose immediate family were principal owners of The Washington Post that, in turn, held ownership interest in Time-Warner, at the time the appeal was heard and summarily determined by *per curiam affirmance* within a week of the March 12 oral argument. These matters were immediately presented to the appeals court through a motion for rehearing and for disqualification of the panel, but the motion was denied without opinion. These conflicts should have caused the Second District panel to disqualify themselves and to have the matter reheard before a new panel without the financial conflicts of interest. This is the first basis for requesting a writ of prohibition against the Second District issuing a mandate following the decision of that panel.

For the second basis, petitioner contends there was a departure from the essential requirements of law in the trial and appellate courts' proceedings for which there is no adequate remedy remaining by appeal. Essentially, both courts disregarded the requirements of Civ.R. 1.510.

The circuit court judge that determined the action did so as his final adjudicative act before retiring. Prior to the summary judgment proceeding, the defendant had moved to dismiss petitioner's complaint several times upon its argument that the Cable Communications Act of 1992 preempted the local franchise agreement and forced the rate changes. Although dismissing the initial and first amended complaints so that class and class representative allegations could be more fully detailed, this same circuit court judge denied the preemption argument advanced by the defendant in each of the successive motions to dismiss. (orders-**App. tab D**) The circuit court judge did so based upon petitioner's showing that the Cable Communications Act of 1992 contained an express exemption from its rate-setting

requirements for pre-existing franchise agreements such as defendant's. This exemption is found at 47 U.S.C.A. §543(j) of the Act. The trial judge upheld the sufficiency of the causes of action stated in all three counts. This was the law of the case at the time the Second Amended Complaint was finally answered by the defendant.

The defendant's Answer denied all but one of the material allegations of the Second Amended Complaint and raised 16 affirmative defenses. Petitioner's Reply denied all of the 16 affirmative defenses. (Reply-**App. tab E**)

Two weeks after the defendant answered the complaint, it moved for summary judgment. The defendant raised the same legal argument of preemption, then misrepresented that there were no material facts in dispute, and set the matter for hearing on the eve of the assigned circuit court judge's retirement. (Motion for Summary Judgment-**App. tab F**) The only materials belatedly filed in support of the motion were an unsworn and therefore incompetent affidavit of defendant's President and two depositions taken after the motion was filed. One was of Pinellas County Attorney Howard Bernstein, and the other of a deputy county administrator, Stephen Carroll. These were advanced by the defendant to establish that the actions complained of were done with the intention of complying with the Cable Communications Act of 1992. Nothing in these materials established that any of the issues of material fact were not in genuine dispute.

The circuit court judge entered summary judgment. His order recited that "having considered the pleadings, affidavits, depositions and argument of counsel" there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Had the circuit court judge actually examined the pleadings, as he represented, he could not possibly have made such an obvious error. Instead, he signed an order that misrepresented the pleadings as not being in material dispute.

The circuit court judge's summary judgment order contained no discussion or findings of law, regrettably

typical of Florida Circuit Courts, so no one can determine whether he merely determined that the pleadings were immaterial and that he should have granted the defendant's earlier filed motions to dismiss as a matter of law. [At the time, the defendant had cited the Cox Cable Communications, Inc. v. United States, 992 F.2d 1178 (11th Cir. 1993) decision in support of its preemption argument.] Nonetheless, that is not what the circuit court judge said - he said he had examined the pleadings and found there was no genuine issue as to any material fact, and this is simply, inexcusably, an error that amounts to a departure from the essential requirements of the law.

Predictably, petitioner appealed, as no motion for rehearing could take place before the immediately retired circuit court judge. At the appellate court, petitioner cited two new controlling decisions, Landgraf v. USI Film Prod., __U.S.__, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and James Cable Partners v. Jamestown, Tenn. by Duncan, 43 F.3d 277 (6th Cir. 1995), that once and for all removed this preemption argument from defendant's case. The Second District panel, which was not identified to the parties until the morning of oral argument, entered a *per curiam affirmed* decision a week after oral argument. Petitioner moved for rehearing based upon what the oral argument had revealed as Judge Lazzara's critical mistake in fact. (Motion for rehearing - **App. tab G**) In addition to pointing out the mistake in fact, petitioner pointed out the conflicts of financial interest that could not have been discovered earlier and requested that the panel disqualify itself and that the matter be reheard before a disinterested panel of judges. That motion was promptly denied, again without opinion.

III.
THE NATURE OF RELIEF SOUGHT

The nature of the relief sought by this petition is a writ of prohibition directing the respondent Chief Judge of the Second District Court of Appeal to stay the issuance of its

mandate until the matters raised by this petition are determined in proceedings before a new panel of disinterested judges or, in the alternative, to render such other or further relief as may be appropriate under this court's original jurisdiction to issue all writs under Fla.R.App.P. 9.030((a)(3) to remedy the denial of due process in this cause.

IV.
ARGUMENT

The trial court made a manifest mistake in its review of the pleadings. The Second District appellate court appeared from oral argument to have affirmed based upon a different mistake concerning Judge Lazzara's misapprehension of the timing and purpose of a local ordinance, PCO 93-103. The defendant in its Reply to the motion for rehearing implicitly acknowledged the mistake and reiterated its reliance on its original preemption defense. (see Reply to Motion - **App. tab H**) The Second District panel did not address the merits or sufficiency of petitioner's request for rehearing and disqualification, which was presented in the motion for rehearing. (Order - App. tab E) Petitioner has been denied due process of law as a result and will suffer loss of its claims thereby.

A class action that survived multiple motions to dismiss was summarily determined without presentation of any substantial or competent supporting evidence to show the material facts disputed by the pleadings were not in genuine dispute. This was a departure from the essential requirements of law in that the trial court ignored this court's mandatory findings set forth in Civ.R. 1.510 for entering summary judgment.

Assuming *arguendo* that the circuit court actually treated the motion for summary judgment as a reconsideration of the earlier filed motions to dismiss and agreed that the Cox Cable decision controlled, it was still error by the time of oral argument before the Second District because the interim produced two controlling decisions, Landgraf and James Cable, supra. Defendant's preemption argument utterly

failed on the recent U.S. Supreme Court decision in Landgraf v. USI Film Prod., supra, as explained by the Sixth Circuit in James Cable Partners v. Jamestown, Tenn. by Duncan, supra. The Second District addressed neither their own error about the timing of the passage of PCO 93-103, which Judge Lazzara had expressly stated at oral argument he assumed must have been the justification for defendant's breach of contract, nor the basis for disqualification of the panel, including Judge Lazzara, in denying petitioner's motion for rehearing.

Petitioner, a numerous class of affected subscribers with a substantial amount in controversy, have been denied due process by trial and now by an appellate court without a single word of decision explaining the rulings from either body. This is virtually inexplicable. A writ should issue so that this matter can proceed properly, before a disinterested panel at the district court of appeal level and eventually be properly determined before a new circuit court judge.

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CO-COUNSEL FOR APPELLANT

A true copy of the foregoing has been served by U.S. Mail on below listed counsel,

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Palm Harbor, FL 34685

and by Federal Express, next day delivery to the

Chief Judge, Second District
Court of Appeal
1005 E. Memorial Blvd.
Lakeland, FL 33801

this 13th day of May, 1996.

Jeffrey N. Kramer (s)
JEFFREY N. KRAMER, ESQ.

IN THE SUPREME COURT
OF FLORIDA,

JEROME F. KRAMER, individually Petitioner,	) SECOND DISTRICT COURT OF) APPEAL Case No.95-01470)
vs.	) EMERGENCY) MOTION TO STAY
VISION CABLE OF PINELLAS, INC., a Florida corporation, and CHIEF JUDGE, SECOND DISTRICT COURT OF APPEAL, Respondents	) ISSUANCE OF MANDATE) BY SECOND DISTRICT) COURT OF APPEAL))))

Petitioner hereby moves for immediate entry of an order staying the issuance of mandate by the Second District Court of Appeal in the captioned action, stating in support that:

1) On May 13, petitioner served its "*Petition for Writ of Prohibition*" in this court that would have been filed on May 14, 1996. Concurrently, petitioner served and filed its "*Motion to Stay Issuance of Mandate Until Petition for Writ of Prohibition is Determined*" in the Second District Court of Appeal. That request was summarily denied by order entered on May 17, 1996. A copy of the *Motion to Stay Issuance of Mandate Until Petition for Writ of Prohibition is Determined* and the May 17 order denying it are attached as an appendix to this motion.

2) Petitioner's *Petition for Writ of Prohibition* has not been determined by this court, yet issuance of a mandate by the Second District Court of Appeal would defeat this court's jurisdiction to determine the pending petition on its merits.

3) Petitioner requests that an order be entered staying the Second District Court of Appeal from entering its mandate

until such time as this court determines the pending *Petition for Writ of Prohibition*.

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and by Federal Express, next day delivery to the

Chief Judge, Second District
Court of Appeal
1005 E. Memorial Blvd.
Lakeland, FL 33801

this 22nd day of May, 1996.

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CO-COUNSEL FOR APPELLANT

MANDATE
FROM
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STYLE: Jerome F. Kramer v. Vision Cable of Pinellas, Inc.

COUNTY: Pinellas

APPELLATE CASE NO: 95-01470

TRIAL COURT CASE NO: 94-2593-CI-20

This cause having been brought to this court by appeal and after due consideration, the court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this court and with the rules of procedure and laws of the State of Florida.

Witness, The Honorable Edward F. Threadgill, Jr., Chief Judge of the District Court of Appeal of the State of Florida, Second District, and the seal of the said court at Lakeland, Florida, on this day.

May 23, 1996

William Haddad (s)
William A. Haddad
Clerk, District Court
of Appeal
Second District

(SEAL)
District Court of Appeal
State of Florida
Second District

SUPREME COURT OF FLORIDA
TUESDAY, MAY 28, 1996

JEROME F. KRAMER, ETC.,
Petitioner,

v. Case No. 88,027

VISION CABLE OF PINELLAS,
INC., ETC., ET AL.,
Respondents.

Petitioner's Emergency Motion to Stay Issuance of Mandate by Second District Court of Appeal is denied.

A True Copy

(Seal)

TEST: Supreme Court of the
State of Florida

Sid J. White
Clerk, Supreme Court

cc: Hon. William Haddad, Clerk
Mr. Jeffrey N. Kramer

Mr. John A. Schaefer
Mr. George Sanchez

SUPREME COURT OF FLORIDA
Wednesday, June 19, 1996

JEROME F. KRAMER, ETC.,
Petitioner,

v. Case No. 88,027

VISION CABLE OF PINELLAS,
INC., ETC., ET AL.,
Respondents.

The petitioner in the above cause has filed a Petition for Writ of Prohibition, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied. OVERTON, SHAW, HARDING, WELLS AND ANSTEAD, JJ., concur.

A True Copy

(Seal)

Sid J. White
Clerk, Supreme Court

TEST: Supreme Court of the
State of Florida
By: Betsy Hill, Deputy Clerk

cc: Mr. Jeffrey N. Kramer
Hon. Edward F. Threadgill, Jr.
Hon. William A. Haddad, Clerk
Mr. John A. Schaefer
Mr. George Sanchez

Title 47 U.S.C. Sec. 543 (a) and (j)

Sec. 543 (a)

Competition preference; local and Federal regulation (1) In general No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this Section and Section 532 of this title. Any franchising authority may regulate the rates for the provision of cable services, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this Section. No Federal agency, State or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

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Sec. 543 (j)

Rate regulation agreements - During the term of an agreement made before July 1, 1990, by a franchising authority and

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a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

Florida Statutes §38.02

38.02 Suggestion of disqualification; grounds; proceedings on suggestion and effect

In any cause in any of the courts of this state any party to said cause, or any person or corporation interested in the subject mater of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within thirty days after the party filing the suggestion, or his attorney, or attorneys, or record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion appear from the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his disqualification, and declaring himself to be disqualified in said cause. If the truth of any such suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds that the suggestion is true, he shall forthwith enter an order reciting the ground of his disqualification and

declaring himself disqualified in the cause; if he finds that the suggestion is false, he shall forthwith enter his order so recit-

ing and declaring himself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

FLORIDA RULES OF CIVIL PROCEDURE

RULE 1.510 SUMMARY JUDGMENT

(c) Motion and Proceedings Thereon. The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least 20 days before the time fixed for the hearing. The adverse party may serve opposing affidavits by mailing the affidavits at least 5 days prior to the day of the hearing, or by delivering the affidavits to the movant's attorney no later than 5:00 p.m. two business days prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that ap-

pear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. On the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

FLORIDA RULES OF APPELLATE PROCEDURE

RULE 9.030 JURISDICTION OF COURTS

(a) Jurisdiction of Supreme Court
(1) Appeal Jurisdiction.
(A) The supreme court shall review, by appeal
(i) final orders of courts imposing sentences of death;
(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
(B) If provided by general law, the supreme court shall review
(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;
(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.
(2) Discretionary Jurisdiction.
The discretionary jurisdiction of the supreme court may be sought to review.
(A) decisions of district courts of appeal that
(i) expressly declare valid a state statute;
(ii) expressly construe a provision of the state or federal constitution;
(iii) expressly affect a class of constitutional or state officers;
(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal.

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court and

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

(3) Original Jurisdiction. The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction, and may issue writs of mandamus and quo warranto to state officers and state agencies. The supreme court or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.